Supreme Court, U.S.
FILED
MAY 27 1993
OFFICE OF THE CLERK

No. 92-1718

In The

Supreme Court of the United States

October Term, 1992

HAMILTON TAFT & COMPANY,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION, STANFORD UNIVERSITY HOSPITAL, THE BOARD OF TRUSTEES LELAND STANFORD JUNIOR UNIVERSITY FREDERICK S. WYLE AS TRUSTEE FOR HAMILTON TAFT & COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the Court review an unpublished memorandum decision affirming a determination that a bankruptcy appeal is moot where

- petitioner's failure to seek a stay allowed a comprehensive change in circumstances to occur;
- it is no longer possible to order any effective relief; and
- the decision follows established principles adhered to by every other court of appeals that has considered them?

RULE 29.1 STATEMENT

Stanford University is a trust.

Stanford University Hospital is a non-profit corporation the members of which are the individual members of the board of trustees of Stanford University.

All Federal Express Corporation subsidiaries are wholly owned.

Frederick S. Wyle is the Chapter 11 Trustee of Hamilton Taft & Company. The stock of Hamilton Taft & Company is owned by Knightsbridge Company, Inc.

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JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Federal Express Corporation, Stanford University Hospital, the Board of Trustees of Leland Stanford Jr. University and Frederick S. Wyle, Trustee oppose review of a decision of the United States Court of Appeals for the Ninth Circuit affirming the district court's order dismissing as moot petitioner's appeals from four bankruptcy court orders.

JURISDICTION

Respondents assert that petitioner does not have standing to pursue this petition, as discussed more fully below in section I.

STATEMENT OF THE CASE

Petitioner's Statement of the Case and, indeed, its "Question Presented," suggest that petitioner was the innocent victim of a capricious and wholly unauthorized maneuver by Hamilton Taft & Company's creditors to place petitioner into involuntary bankruptcy. Not so. Respondents provide this supplement (based on the findings of the courts below) to set the record straight.

In March 1991, respondents Federal Express Corporation, Stanford University Hospital and Stanford University Board of Trustees discovered that at least $34 million they had sent to Hamilton Taft was not forwarded timely to the taxing agencies and that substantial tax penalties were owed. Petitioner's Appendix 3a, 11a, 20a-21a (hereinafter "Pet.App."). Upon this discovery and Hamilton Taft's failure to adequately explain its actions, they then filed an involuntary bankruptcy petition against Hamilton Taft.

On March 26, 1991, the bankruptcy court entered orders appointing Frederick S. Wyle as Trustee ("Trustee"). On May 17, 1991, it authorized the Trustee to close down Hamilton Taft's business. On May 28, 1991, the Trustee filed his First Interim Report, describing the

preliminary results of his investigation into Hamilton Taft's affairs. Pet.App. 3a.

The Trustee concluded that $55.2 million, net of repayments, had been transferred from Hamilton Taft to entities controlled by Hamilton Taft's president, Connie C. Armstrong, Jr., ("Armstrong") during the two-year period Armstrong owned Hamilton Taft. The Trustee found the money had been used for a combination of 1) speculative ventures and investments in Texas, many of which are defunct and none of which had produced any profit, 2) funding the operations of the Armstrong companies, and 3) personal luxuries for Armstrong, including a "hobby" cattle ranch, costing an estimated $10 million. According to the Trustee, Hamilton Taft owed at least $90.9 million in unpaid taxes to its clients, resulting principally from Armstrong's diversion of payroll tax deposits. Hamilton Taft had $5.8 million available to meet these liabilities. *Id.* On May 31, 1991, on a motion for summary judgment, the bankruptcy court issued an order of relief. Subsequently, four other companies controlled by Armstrong ("Texas Debtors") filed their chapter 11 cases in Texas. Pet.App. 3a, 11a.

Because neither Hamilton Taft nor Armstrong sought a stay, the Trustee took control of the business. Prior to the district court's hearing of Hamilton Taft's appeals, the Trustee:

1) shut down Hamilton Taft's business;

2) filed an adversary proceeding in the Hamilton Taft bankruptcy case against Armstrong and every entity controlled by him of which the Trustee had knowledge, seeking recovery of assets fraudulently conveyed from

Hamilton Taft, *Frederick S. Wyle v. Connie C. Armstrong, Jr., et al.*, Adv. Proc. No. 91-3-081-LK;

3) successfully pursued a motion for change of venue, transferring venue of the four Texas Debtors to San Francisco;

4) successfully obtained joint administration of the Texas Debtors' cases with that of Hamilton Taft;

5) sought and won the substantive consolidation of the Texas Debtors and Hamilton Taft, and was appointed Trustee of the consolidated estate, without opposition by any of the debtors, including Hamilton Taft;

6) was granted authorization to sell, among other numerous sale transactions, several town houses, Hamilton Taft's office equipment and furniture, luxury vehicles, cattle, horses, and other personal property; and

7) took title to Armstrong's cattle ranch.

The district court found that as a result of the substantive consolidation and other actions, the assets of the Texas Debtors are now under the control of the Trustee. Pet.App. 3a-4a, 12a-13a.

After the Trustee was appointed, further court orders were issued by the bankruptcy court authorizing or approving the Trustee's transactions as Trustee of Hamilton Taft and the Texas Debtors. These orders cover a variety of activities, including sales of assets, contracts with third parties, abandonment of assets, employment of professionals and other consultants, and the operations of Hamilton Taft and the Texas Debtors. Pet.App. 4a, 13a. At no time did Hamilton Taft or Armstrong seek a stay pending appeal.

The district court held Hamilton Taft's appeals moot on two separate and independent grounds. First, the actions taken by the Trustee had created a substantial change in circumstances that made it impossible for the district court to fashion relief. Second, by failing to seek a stay and permitting the substantial changes in circumstances to occur, Hamilton Taft had allowed the appeals to become moot for lack of equity. Pet.App. 4a, 14a.

The Ninth Circuit Court of Appeals affirmed in an unpublished memorandum decision. Noting that there were two independent grounds for finding the appeals moot, the court focused on petitioner's demand for equitable remedies. "Equitable remedies in bankruptcy proceedings are unavailable to appellants who fail to seek a stay of the bankruptcy court's objectionable orders, permitting a comprehensive change of circumstances to occur." Pet.App. 5a. The court concluded: "Not only has Hamilton [Taft] lost its claim to an equitable remedy by failing to seek a stay, but the maxim 'he who comes into equity must come with clean hands' applies here with particular force." Pet.App. 6a-7a.

SUMMARY OF ARGUMENT

Nothing in this case warrants Supreme Court review. First, the Trustee, as the duly appointed representative of Hamilton Taft's sole shareholder, has not authorized the filing of this petition. In fact, the Trustee opposes this petition. This petition is actually brought by Hamilton Taft's former president, who has no authority or standing to act on behalf of Hamilton Taft.

Second, the Ninth Circuit's unpublished memorandum decision presents no important questions of law. The decision simply applies well-recognized equitable reasons to dismiss an appeal as moot. There is no conflict with a decision of any other court of appeals.

Third, the Ninth Circuit properly found petitioner's appeals had become moot. Petitioner's failure to seek or obtain a stay resulted in a comprehensive change of circumstances making it inequitable to hear the merits of the appeals. The appeals are also moot on jurisdictional grounds because petitioner had no available or effective relief.

Fourth, equitable mootness is not illegal or violative of congressional intent. If equitable mootness deprived petitioner of its appeal, it is only because petitioner failed to seek or obtain a stay.

REASONS FOR DENYING THE WRIT

I. Petitioner Has No Standing to Pursue This Writ in the Name of Hamilton Taft

The petition purports to be filed by Hamilton Taft, as debtor, but it is not. The Trustee is the duly appointed Chapter 11 trustee of Hamilton Taft's sole shareholder, Knightsbridge Company, Inc. ("Knightsbridge"), one of the Texas Debtors. The order appointing him trustee of Knightsbridge was unchallenged, being stipulated to by Knightsbridge, which was controlled by Armstrong. That order was not appealed. Only the Trustee has the right to control the activities of Hamilton Taft, as debtor. Only the Trustee can authorize legal proceedings on behalf of the

Debtor. *See* 11 U.S.C. § 323 (1988). The Trustee did not authorize this petition for certiorari to be filed by or on behalf of Hamilton Taft. Indeed, the Trustee opposes this petition.

This petition, like the appeals below, is directed by Armstrong, the former president and chairman (and only member) of the Board of Directors of Hamilton Taft. Counsel representing petitioner are Armstrong's personal lawyers. Neither Armstrong nor his personal lawyers have any authority or standing to take any action on behalf of Hamilton Taft, much less pursue this petition. Armstrong has not appealed, and has not filed this petition in his own name. He is purporting to do so in the name of the corporation, Hamilton Taft. This he has no authority to do.

Armstrong has no authority to bring this petition. The petition should be denied.

II. There is No Conflict In the Circuits Regarding Whether An Appeal May Be Moot For Equitable Reasons.

Petitioner asserts that there is a conflict among the circuit courts as to whether equitable reasons may justify a determination that an appeal is moot. Petition for Writ of Certiorari 11-12 (hereinafter "Pet."). Petitioner is wrong – there is no circuit split.

In the bankruptcy context, an appeal may be dismissed as moot upon two grounds: jurisdictional and equitable. First, if events occur which make it impossible for an appellate court to fashion effective relief, the court

is operating outside of its Article III constraints, and the case is moot for jurisdictional reasons. *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895) (Article III courts decide live controversies, and do not "give opinions upon moot questions"). Second, an appeal may be dismissed as moot if implementation of any conceivable relief will be inequitable. This equitable mootness is a recognized supplement to the traditional jurisdictional mootness in bankruptcy cases which, in part, evolved from "the particular need for finality in orders regarding stays in bankruptcy." *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421, 1424 (9th Cir. 1985). Equitable mootness is rooted firmly in sound notions of public policy, and promotes the orderly administration of estates by affording finality to the judgments of the bankruptcy courts. *In re Texaco, Inc.*, 92 B.R. 38, 46 (S.D.N.Y. 1988).

All courts that have addressed the issue, which include courts in the vast majority of circuits, have recognized that equitable reasons can render a case moot.[1] *See In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986) (recognizing that equitable considerations may justify mootness); *In re Public Service Co.*, 963 F.2d 469 (1st Cir.) (appeal moot where requested relief inequitable or impractical because of change in circumstances), *cert. denied* 113 S.Ct. 304 (1992); *In re Chateaugay Corp.*, 988 F.2d 322 (2nd Cir. 1993) (appeal moot if inequitable to implement conceivable relief); *In re Delaware & H. Ry. Co.*, 129

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[1] As far as respondents can determine, equitable mootness has not been addressed by courts in the Seventh and Tenth Circuits, and the Eleventh Circuit has specifically declined to decide the issue. *See In re Club Assoc.*, 956 F.2d 1065, 1068 n.10 (11th Cir. 1992).

B.R. 388 (D.Del. 1991) (appeal moot based on well-established rules of justiciability and need for finality); *In re Quality Spice Corp.*, 107 B.R. 843 (D.N.J. 1989) (equitable considerations render appeal moot), *aff'd* 908 F.2d 961 (3d Cir. 1990); *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 841 F.2d 79 (4th Cir. 1988) (appeal moot where effective relief not practically available and would create unmanageable situation for bankruptcy court); *Matter of Crystal Oil Co.*, 854 F.2d 92 (5th Cir. 1988) (appeal moot where no effort to obtain stay resulted in change of circumstances rendering it inequitable to reach merits of appeal); *In re Hamady Bros. Food Markets*, 110 B.R. 815 (E.D.Mich. 1990) (factors in determining mootness include failure to seek stay, virtues of finality and difficulty in unwinding confirmation order); *In re Information Dialogues, Inc.*, 662 F.2d 475 (8th Cir. 1981) (mootness promotes policy of finality unless stay is obtained); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981) (appeal moot where failure to obtain stay results in comprehensive change in circumstances).

The Ninth Circuit recognized the two grounds justifying mootness, noting that an appeal may become moot if events "occur that make it impossible for the appellate court to fashion effective relief" *or* when failure to obtain a stay permits " 'such a comprehensive change of circumstances to occur as to render it inequitable . . . to consider the merits of the appeal.' " Pet.App. 5a (quoting *Roberts Farms*, 652 F.2d at 798).[2] This case represents no more than an apt application of equitable mootness.

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[2] The Ninth Circuit recently held an appeal of the disbursement of estate funds not moot because there was no difficulty in fashioning effective and equitable relief. *In re Spirtos*, No. 91-56496, 1993 U.S. App. LEXIS 10550 (9th Cir. May 11, 1993). In

Relying on dicta buried in a footnote, petitioner claims that equitable reasons for mootness, particularly finality, have been rejected by the Fifth Circuit. Pet. 15-17. Petitioner is wrong.

In *In re Sullivan Central Plaza, I, Ltd.*, 914 F.2d 731 (5th Cir. 1990), the Fifth Circuit affirmed a determination that an appeal was moot where the appellate court was unable to fashion effective relief. *Id.* at 733-34. *Sullivan* involved no more than the simple application of jurisdictional mootness in a case where property that is the subject of the appeal is sold or foreclosed on during the appeal because there was no stay. Because the property has been sold or foreclosed on, it is impossible for the appellate court to fashion effective relief. Although not an issue in the case, the *Sullivan* court did recognize that other courts "also offer the need for finality as additional support for the mootness doctrine," but did not accept that reasoning as the "dominant rationale" for mootness. 914 F.2d at 734. This unremarkable dictum does not reject the equitable mootness doctrine and it does not create any conflict in the circuits.

Moreover, on facts similar to the present case, *Matter of Crystal Oil Co.*, 854 F.2d 79 (5th Cir. 1988), clearly establishes the adoption of the equitable mootness doctrine in the Fifth Circuit. In *Crystal Oil* the order confirming a plan of reorganization was not stayed pending appeal. Without a stay, the plan became effective and payments to creditors began, intercompany debts were

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doing so, however, the court acknowledged the equitable grounds justifying mootness. *Id.* at *5-6.

canceled, and new publicly traded securities were issued. Because appellant sought only to affect future actions of the debtor, which allegedly would have no substantial adverse impact on other parties, appellant argued that effective relief was possible, and thus, the appeal was not moot. *Id.* at 81. The Fifth Circuit dismissed the appeal, noting: "We doubt that effective relief is possible, and conclude that common sense and equitable considerations require dismissal of this appeal." *Id.* (citing *AOV Industries*, 792 F.2d at 1149). According to the court, appellant should have sought a stay so its appeal could be heard before third parties relied on the plan. "An appeal may be dismissed when an appellant has made no effort to obtain a stay and has permitted 'such a comprehensive change of circumstances to occur as to render it inequitable' for the appellate court to reach the merits of the appeal." *Id.* at 82 (quoting *Roberts Farms*, 652 F.2d at 798).

Nothing in *Sullivan* suggests that the Fifth Circuit overruled its prior decision in *Crystal Oil*. The Fifth Circuit recognizes equitable mootness. There is no split of authority among the circuits. The petition should be denied.

III. The Facts of this Case Establish that the Ninth Circuit and District Court Properly Dismissed Petitioner's Appeals on Grounds of Equitable Mootness

Petitioner failed to seek or obtain a stay pending appeal of any of the four orders from the bankruptcy court or the district court. The Ninth Circuit properly

determined that petitioner's failure to seek or obtain a stay below and the resulting change in circumstances rendered its appeals moot.

An appellant who elects not to seek a stay pending appeal accepts the risk that its appeal will be dismissed as moot. *In re Chateaugay Corp.*, 988 F.2d 322, 326 (2d Cir. 1993); *In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981). Under circumstances such as those here, "it is incumbent upon a party to seek a stay lest the appeal in question be rendered moot by constitutional or equitable/jurisprudential reasons." *In re Texaco, Inc.*, 92 B.R. 38, 44-45 (S.D.N.Y. 1988).

After appointment of the Trustee and entry of the order for relief, Hamilton Taft failed to seek a stay pending appeal from the bankruptcy court. Nor did it seek a stay from the district court or the court of appeals. Instead, Hamilton Taft acquiesced in the continued progress of the bankruptcy case, as controlled by the Trustee. As a result, Hamilton Taft's business was shut down, adversary proceedings were filed against Armstrong and others for recovery of fraudulent conveyances, venue of the Texas Debtor's bankruptcy case was changed, the Texas Debtors and Hamilton Taft bankruptcy cases were substantively consolidated, and various assets of Hamilton Taft were sold by the Trustee. These subsequent events resulted in a substantial change in circumstances. As the district court and the circuit court correctly determined, the comprehensive change in circumstances made it inequitable to hear the merits of the appeals. Pet.App. 6a, 14a. *See Roberts Farms*, 652 F.2d at 798. As a consequence of its failure to seek a stay, petitioner's appeals became moot.

Petitioner argues that if the order for relief were reversed, it could pursue a damage claim against the respondents and take over what is left of Hamilton Taft. This theoretical remedy, petitioner argues, constitutes effective relief and prevents these appeals from being moot. As the Ninth Circuit observed, petitioner misses the point – the appeal is moot on equitable grounds. Pet.App. 6a.

Petitioner's argument is wrong in any event. An appeal will be considered moot if the court is unable to grant any *effective* relief. *See e.g., Matter of Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977); *Roberts Farms*, 652 F.2d 793. No effective relief can be granted in this case. The relief petitioner seeks, based on only one of the myriad of interrelated bankruptcy court orders, is neither available nor effective.

First, the order for relief cannot be isolated. Where the "facts make it difficult, if not impossible, to fashion an equitable remedy that would restore appellants to their former positions," as in this case, an appeal should be dismissed as moot. *Valley National Bank v. Trustee for Westgate-California Corporation*, 609 F.2d 1274, 1283 (9th Cir. 1979) (citing *Matter of Combined Metals*, 557 F.2d 179), *cert. denied*, 444 U.S. 1015 (1980). Attempting to undo each and every order here would wreak havoc in an already complex bankruptcy case.

Because petitioner failed to seek or obtain a stay, the comprehensive change in circumstances that occurred cannot be unraveled. No relief can resuscitate the Hamilton Taft business, or undo the numerous sales of assets, the change of venue, the substantive consolidation of the

Texas Debtors and Hamilton Taft, or the adversary proceedings to recover from Armstrong and other third parties who received Hamilton Taft assets.

Second, even if the order for relief could be isolated and overturned, Armstrong could not pursue a damage claim against the respondents. Any damage claim that might exist belongs to the Trustee. Once a right of action passes to the Trustee as property of the estate, the debtor or any other party lacks standing to pursue it. 11 U.S.C. § 323 (1988); *St. Paul Fire and Marine Insurance Co. v. Pepsico, Inc.*, 884 F.2d 688, 700 (2d Cir. 1989); *In re Mortgageamerica Corporation*, 714 F.2d 1266 (5th Cir. 1983). Moreover, even if the order for relief could be overturned, as a practical matter the Trustee would not be ousted because he was subsequently appointed Trustee of the substantively consolidated cases. That order was never appealed. Thus, the relief petitioner seeks is neither available, nor effective.

As the Ninth Circuit properly found, petitioner's failure to obtain a stay resulted in a comprehensive change in circumstances that made it inequitable to hear the merits of the appeals. Further, even if the order for relief were reversed, petitioner would still lack effective relief. Therefore, the case was properly deemed moot. The petition should be denied.

IV. Petitioner's Contentions that Dismissal for Mootness is Illegal or Violates Congressional Intent in Bankruptcy Cases Are Entirely Without Support.

Respondents do not take issue with petitioner on the serious nature and requirements of involuntary petitions

for bankruptcy. These points, however, are not at issue in this or any previous appeal.

Petitioner's argument that equitable mootness is illegal is unsupported by any authority. Petitioner provides absolutely no evidence of congressional intent showing that an order on an involuntary petition may not become moot on appeal.

Petitioner complains that it has been deprived of its statutory rights of appeal. Pet.11. Not so. By failing to *ever* seek a stay pending appeal, petitioner ran the risk that its appeals would become moot. *See In re Chateaugay Corp.*, 988 F.2d 322, 326 (2d Cir. 1993) ("The party who appeals without seeking to avail himself of . . . protection [of a stay] does so at his own risk."). If petitioner's appeals have been precluded, it is only because of petitioner's own inaction and failure to protect and preserve its rights. Petitioner cannot complain. Indeed, in *In re Sullivan Central Plaza, I, Ltd.*, 914 F.2d 731 (5th Cir. 1990), the case that petitioner incorrectly claims rejects equitable mootness, the court recognized that while dismissing an appeal as moot insulates bankruptcy court orders from review, the debtor could have avoided this by obtaining a stay of the order pending appeal. *Id.* at 736. Similarly, in the present case, petitioner's own conduct has precluded its appeals.

Moreover, as the Ninth Circuit concluded: "Not only has Hamilton [Taft] lost its claim to an equitable remedy by failing to seek a stay, but the maxim 'he who comes into equity must come with clean hands' applies here with particular force." Pet.App. 6a-7a.

There is nothing illegal or violative of congressional intent when an appeal of a bankruptcy order is found moot. It is a clear, well established judicial doctrine, which does not warrant Supreme Court review. The petition should be denied.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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